United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1348

To be argued by
JOHN A. LOWE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1348

UNITED STATES OF AMERICA,
Appellee,

—v.—

ROBERT BERKSON and MAURICE RIND,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Robert Berkson and Maurice Rind appeal from judgments of conviction entered on July 22, 1976, in the United States District Court for the Southern District of New York, after a one week trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 75 Cr. 608, filed June 19, 1975, charged the defendants Berkson and Rind and two others with one count of securities fraud in violation of Title 15, United States Code, Sections 78j(b) and 78ff; two counts of mail fraud in violation of Title 18, United States Code, Section 1341; two counts of securities fraud in violation of Title 15, United States Code, Sections 77q(a) and 77x; four counts of transporting forged securities in interstate commerce in violation of Title 18, United States Code, Section 2314; and one count of conspiracy in violation of Title 18, United States Code, Section 371.

Trial commenced on June 3, 1976 and ended on June 9, 1976, when the jury found both defendants guilty on Counts Three through Ten.*

On July 21, 1976 (entered July 22, 1976), Judge Cannella sentenced Berkson to a suspended sentence and fines totalling $25,000. On July 22, 1976, Judge Cannella sentenced Rind to concurrent terms of 18 months' imprisonment and fines of $10,000. The defendant Rind is at liberty pending this appeal.

Statement of Facts

The Government's Case

During 1970 and up to March 1971, Packer, Wilbur & Co., Inc. (Packer, Wilbur) was a registered broker-dealer with offices in Manhattan. (Tr. 12, 32).** Wilbur Hyman was the president and a director; the defendant Rind was vice-president and a director; the defendant Berkson was the corporate secretary and a director; and James Gallentine, the Government's principal witness at the trial,*** was the cashier, a salaried employee. (Tr. 32, GX 29). By August, 1970, Packer, Wilbur was experiencing severe financial problems, evidenced by almost daily

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* The Court dismissed Count One (securities fraud) at the close of the Government's case; the jury acquitted both defendants on Count Two (mail fraud). The co-defendant Gallentine pleaded guilty to Count One. The co-defendant Hyman is a fugitive.

** References to the trial transcript are in the form "Tr. ..."; to Government Exhibits in the form "GX ...."; to defense exhibits in the form "DX ...."; to Appellants' Appendix in the form "App. ...."; to Appellants' Briefs in the form "Br. ....".

*** In addition to Gallentine, various clerical employees testified along with customers whose stock was misappropriated. Records of Packer, Wilbur and of various banks and brokerage firms established the details of the various transactions.

overdrafts in its bank account. (Tr. 34; GX 36). The problem worsened during September (GX 36) and by October 31, 1970, Packer, Wilbur was functionally bankrupt. (GX 26).

In order to raise cash on a temporary basis and delay actual bankruptcy, (Tr. 56, 57), Packer, Wilbur borrowed money, (Tr. 40; GX 18, 19, 19A, 19B), engaged in check kiting, (Tr. 129-30, 343-47; GX 33, 33A, 33B, 40, 41), and carried on sham sales of stock to obtain bank loans on false pretenses.* (Tr. 65-69, 73-76; GX 4, 4A, 4D, 12, 13, 13A, 14, 14A).

As a part of these efforts "to stay in business", (Tr. 56), Packer, Wilbur resorted to the misappropriation of stock certificates held in safekeeping for customers. The first misappropriation occurred in connection with a $300,000 loan in August, 1970 from Euclid National Bank, Cleveland, Ohio. The loan was arranged by the defendant Rind and was secured, in part, by a pledge by Packer, Wilbur of 10,000 shares of Leasepac Corporation (Leasepac) stock. (Tr. 40; GX 18, 19, 19A, 19B). The use of the stock as collateral was authorized by the Packer, Wilbur board of directors and the authorization was signed by the defendant Berkson (GX 15).

The defendant Rind instructed Gallentine to prepare the certificates needed for the transaction. When Gallentine told Rind that Packer, Wilbur did not have certificates for the full 10,000 shares of Leasepacc available, Rind told Gallentine to use customers' certificates to make up the difference. (Tr. 40-42). Gallentine accomplished this by forging customers' names on stock transfer powers and transferring the customers' stock to Packer, Wilbur. (GX 16, 21, 22).

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* This activity was in violation of Title 18, United States Code, Section 1014, which prohibits false loan applications.

Later in August, 1970, Rind arranged to sell 4,000 shares of Leasepac to Schreiber, Bosse & Co. in Cleveland in two separate transactions. At Rind's direction, Gallentine delivered customers' stock certificates bearing forged stock transfee powers to satisfy the sales. (Tr. 51-65; GX 2, 2A, 2B, 2C, 2D, 2E, 2F, 6, 6A, 6B, 6C). The proceeds of these sales, $56,000, were put into Packer, Wilbur general account and disbursed in the ordinary course of business. (Tr. 59, 62).

On August 20, 1970, Ephraim Block, a customer of Packer, Wilbur, delivered 27,540 shares of Robotguard, Inc. (Robotguard) stock to Packer, Wilbur, (GJ 4B), and on August 26, 1970, David Lipschutz, another customer and a business associate of Ephraim Bloch, delivered 6,000 shares of Robotguard stock to Packer, Wilbur (GX 5B). These deliveries occurred after a series of phone calls between the defendants Berkson and Rind and Allan Salovin, the attorney for Bloch and Lipschutz, in which Berkson and Rind expressed anger at the fact that the sales by Bloch and Lipschutz were "killing the market", (Tr. 320-26), and a call by Hyman to Bloch in which Hyman told Bloch that his two partners were "really in flames" about the sales by Bloch and Lipschutz (Tr. 301) and directed Bloch that both he and Lipschutz should deliver their remaining stock to Packer, Wilbur to insure that no more stock would be sold. (Tr. 299, 301-03).

On the same day that Bloch delivered his stock to Packer, Wilbur, Gallentine, at Hyman's direction, forged stock transfer powers in Bloch's name and delivered them with some of Bloch's stock certificates to the Sterling National Bank to cover a purported sale of 10,000 shares to R. G. Berkson & Co., an account for which the defendant Berkson was a signatory. (Tr. 67-71; GX 12, 13, 13A, 14). The R. G. Berkson & Co. account did not have sufficient funds to cover the transaction (GX 14A), and, on September 22, 1970, the stock was returned to Packer, Wilbur. (GX 13A).

Prior to the purported sale to R. G. Berkson & Co., the defendant telephoned his father, Martin Berkson, and requested his father to buy 10,000 shares of Robotguard to help him out. Berkson's father agreed to do so, but, a few days later, Berkson called and told him his help was not needed. (Tr. 352-54).

On August 21, 1970, at Rind's direction, Gallentine delivered 15,000 shares of Bloch's Robotguard stock, bearing forged stock transfer powers, to First Philadelphia Corp. to cover a sale arranged by Rind. (Tr. 73-75; GX 4, 4A, 4C). By pre-arrangement these shares were repurchased by and returned to Packer, Wilbur a few days later. (Tr. 76; GX 4D).

On September 2, 1970, Wilbur Hyman delivered 5,000 shares of Bloch's Robotguard stock, bearing forged stock transfer powers to Abe Katz as collateral for a loan. (Tr. 292-93; GX 7, 7C). Gallentine had previously given the certificates and the forged stock transfer powers to the defendant Rind to be delivered to Mr. Katz. (Tr. 76-78). Katz delivered the stock to the Atlantic Bank which in turn delivered it to the transfer agent in New Jersey to be transferred into Katz's name. (Tr. 293; GX 7A, 7B).

On or about September 11, 1970, Packer, Wilbur received a letter informing it that Leasepac had declared a stock dividend and forwarding certificates representing Packer, Wilbur's dividend. (Tr. 91-92; GX 27, 27A). Shortly thereafter, Gallentine informed the defendant Berkson that some of Packer, Wilbur's customers might not receive their stock dividend because Packer, Wilbur had used their stock and it might not be in the customers' names any longer. Berkson instructed Gallentine to keep a record of it and said that he would speak to Rind about it. (Tr. 94-97).

On September 18, 1970, David Lipschutz's 6,000 shares of Robotguard were sold and delivered to First Philadelphia Corp. by Gallentine at Hyman's instruction. (Tr. 78-80; GX 5, 5A, 5B, 5E, 5F).

On December 8, 1970, Gallentine, at Rind's direction, delivered 2,500 shares of Leasepac stock to Schreiber, Bosse & Co. Some of the certificates belonged to customers and bore forged stock transfer powers. As on previous occasions, when Gallentine told Rind that the firm did not have 2,500 shares for the transaction, Rind told Gallentine to "do whatever we have to do in order to get up to 2,500 shares." (Tr. 81-83; GX 3, 3B, 8, 8A, 8B, 8C).

During the summer of 1970, Eleanor Melling, a Packer, Wilbur customer who had purchased but never received one hundred shares of Leasepac stock from Packer, Wilbur, telephoned the defendant Berkson and asked about selling her stock. Berkson advised her against selling. Her stock, with a forged stock transfer power, had been sold by Packer, Wilbur. (Tr. 254-57; GX [illegible]).

During the same period of time in which Berkson advised Mrs. Melling not to sell her Leasepac stock, Berkson exercised his discretionary power over the account of Sam Caplan, another customer of Packer, Wilbur who owned 300 shares of Leasepac, to sell 200 shares of Leasepac stock for Caplan's account and sent the proceeds to Caplan. (Tr. 230-31, 240). Subsequently, Packer, Wilbur sold the remaining 100 shares belonging to Caplan by forging his signature to a stock transfer power, and kept the proceeds for the firm. (Tr. 232; GX 28A). On March 4, 1971, Caplan wrote to the defendant Berkson requesting that his remaining 100 shares of Leasepac stock (which had already been sold [GX 28A]) be delivered to his account at another firm. A week or two later Caplan spoke to Berkson about the failure to deliver the stock as requested and Berkson told Caplan he would

take care of it. Berkson never did, nor did he tell Caplan the 100 shares had been sold. (Tr. 233-34; GX 28).

On February 26, 1971, when Packer, Wilbur had ceased doing business and was trying to close out accounts, Gallentine, at Hyman's direction, delivered a block of Ephraim Bloch's Robotguard stock, with forged stock transfer powers, to the Irving Trust Company to be transferred into the names of various other customers to whom Packer, Wilbur owed Robotguard stock. On March 19, 1971, Gallentine mailed the new certificates to the customers. (Tr. 86-90; GX 1, 1A, 1B, 1C, 1D).

None of the customers whose stock was used by Packer, Wilbur had authorized anyone at Packer, Wilbur to use the stock or to sign the customer's name to a stock transfer power. (Tr. 230-37, 242-44, 250-52, 254-58, 259-60, 262-63, 265-74, 276-78, 303, 313-14, 335-38, 340-41). Each time that customers' securities were misappropriated, Gallentine reported this fact to the defendant Berkson.*

ARGUMENT

POINT I

The grand jury testimony of James Gallentine was properly received as substantive evidence.

The defendant Berkson claims that it was error for the District Court to admit the grand jury testimony of James Gallentine as substantive evidence. Berkson acknowledges that prior inconsistent statements of a witness made under oath are generally admissible pursuant to

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* This was the import of Gallentine's testimony before the grand jury admitted as substantive evidence at the trial. (Tr. 103-05; 569).

Fed. R. Evid. 801(d)(1)(A), but argues that the form of the particular statements at issue in this case rendered them inadmissible (Br. 17).

At the trial, Gallentine testified that, apart from a single conversation in September 1970 relating to the possibility that some customers might not receive their Leasepac stock dividend because Packer, Wilbur had used their stock, he had no conversations with Berkson regarding the improper use of customers' securities for the benefit of Packer, Wilbur. (Tr. 97, 102). This was flatly contradictory to a portion of his grand jury testimony given under oath on June 4, 1973 (Tr. 103-05). The grand jury testimony was as follows:

> "Q. Now, apart from Mr. Rind, did you have any conversation with either of the principals of the company with regard to the use of customers' Leasepac stock for the benefit of the Firm?
>
> "A. No, no. Mr. Rind just handled—Mr. Rind set up the transactions, be they sales or loans, and he followed through. Mr. Berkson and Mr. Hyman were aware, yes, but my contact was with Mr. Rind."
>
> "Q. Well, you say that Mr. Hyman and Mr. Berkson were aware. Could you tell us how you know Mr. Hyman and Mr. Berkson were aware of what was going on?"
>
> "A. Well, I had conversation with them as to how we got through the day cash-wise, what we had to do in order to get up the amount of cash necessary."
>
> "Q. In other words, from time to time, you would tell them that Mr. Rind arranged for the transaction, and that is how you got the cash on you provided customers' securities to cover that transaction, and that is how you got the cash on a particular given day?"

"A. Yes, yes. I didn't state specifically what accounts or which customers were used but generally, just generally speaking, we were using customers' securities."

"Q. And both Mr. Berkson and Mr. Hyman knew about that?"

"A. Yes."

"Q. And the reason you can say that is that you specifically recall telling them about what was going on?"

"A. Yes, I spoke to them about it." (Tr. 103-05).

Berkson does not argue that Gallentine's testimony was not in fact inconsistent with his trial testimony. Rather Berkson argues that the grand jury testimony should not have been admitted because it was equivocal, non-specific, conclusory and given in response to leading questions. This argument is without merit.

Initially, it should be noted that Berkson's principal premise—that since Gallentine's grand jury testimony did not also conform to other evidentiary rules with respect to the admissibility of trial testimony, it should not have been admitted under Rule 801(d)(1) (Br. 16)—is unsupported. Fed. R. Evid. 1101(d)(2) specifically notes that the Rules are inapplicable to grand jury proceedings. Berkson's literally unprecedented assertion that grand jury testimony will nonetheless be excluded at trial unless the Federal Rules of Evidence had been observed during the grand jury proceedings is irrational in view of the fact that many of the Rules of Evidence by their very nature simply cannot be followed in a grand jury. See, *e.g.*, Rules 103, 609, 611(a), (b), 613(a), 614, 615. The general rule, of course, is that normal rules concerning the form and admissibility of evidence are utterly inapplicable in a grand jury. *In Re Millow*, 529 F.2d 770 (2d Cir. 1976).

In addition, Berkson drastically overstates the nature of the testimony introduced. Indeed, the thrust of Gallentine's statements to the grand jury was so clear that Berkson was clearly not prejudiced by their admission into evidence. Berkson's distaste for the evidence is in fact based on his aversion to its strong probative content, and his claim on appeal must be rejected as an attempt to grossly magnify the technical defects in the form of the statements. While Gallentine's first statement was concededly in the form of a conclusion that Berkson was "aware", that did not itself render it inadmissible. Fed. R. Evid. 701, 704 permit a lay witness to testify in the form of an opinion or inference when the opinion is rationally based on the witness's perception. That Gallentine's "opinion" was rationally based on his perception of concrete facts is conclusively demonstrated by the subsequent questions and answers in which he unequivocally stated that he knew Berkson was "aware" because he specifically told both Berkson and Hyman that he had, without authority, used customers' securities to generate cash for the firm, not only on one isolated occasion, but from time to time as the various illegal transactions took place. The conclusion that a person is aware of certain facts because the witness himself told him of the facts was clearly rational and founded in fact.

Berkson's argument attempts to isolate each question and answer from its context and argue that it is unclear or equivocal or conclusory. This argument ignores the plain fact that the questions and answers form a closely related, coherent series, which, in context, specified precisely what the witness was talking about—that as each illegal transaction took place, Gallentine told Berkson and Hyman that customers' securities were being used illegally to raise money for the firm.

Thus, when Berkson argues that Gallentine said he told "them" without specifying to whom he was speaking,

he ignores the clear context of the statement which demonstrates that "them" referred directly to Berkson and Hyman, who were clearly identified in the very question to which he was responding. Similarly, Berkson's argument that the use of the conclusory words "aware" and "knew" was improper ignores the clarifying statements setting forth the particularized basis for the conclusion, i.e., that Gallentine told both Berkson and Hyman of the illegal activity as it was taking place. Gallentine's "opinion" thus satisfies Fed. R. Evid. 602 and 701, requiring that the witness set forth his personal knowledge of the "raw data", 3 Weinstein, *Evidence*, § 602[03], on which his conclusion is based. This case is thus distinguishable from *United States* v. *Borelli*, 336 F.2d 376, 392 (2d Cir. 1964), relied on by Berkson, where the witness Ager gave no factual basis for his conclusion that the contents of certain suitcases "must have been narcotics."

Finally, Berkson argues that the admission into evidence of Gallentine's grand jury testimony violated his constitutional right to confrontation and cross-examination. This argument ignores both the facts and the law. Gallentine testified at trial and not only was "subject to cross-examination concerning the statement," Fed. R. Evid. 801(d)(1), but testified on cross-examination that his grand jury testimony was "inaccurate," (Tr. 144), that he was "trying to be helpful," (Tr. 105), that he formulated the answers because he "had been going over the same facts time and time again in the United States Attorney's Office," (Tr. 146) and that he was confused. (Tr. 150). He also testified that all his subsequent employment and income after Packer, Wilbur went out of business was obtained through the defendant Berkson. (Tr. 109-111). As both the Supreme Court and this Court have noted, when a witness is subject to cross-examination concerning the circumstances and truth-

fulness of an out-of-court statement, the admission of that statement—even if unsworn—does not violate the confrontation clause. *California* v. *Green*, 399 U.S. 149 (1970); *United States* v. *Rivera*, 513 F.2d 519, 527 (2d Cir. 1975). As noted by the Advisory Committee to the Federal Rules of Evidence, "The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent statement given in court." *Advisory Committee's Note*, quoting from *Comment, California Evidence Code* § 1235.

Finally, Berkson's contention that the grand jury testimony was the sole evidence against Berkson is erroneous. Gallentine testified at the trial that he informed Berkson in September, 1970, that the firm had used customers' securities. Furthermore, as set forth in Point II, *infra*, there was abundant circumstantial evidence, quite apart from the testimony of Gallentine, that Berkson knew of and participated in the scheme to misappropriate customers' securities.

POINT II

The evidence was more than sufficient for the jury to conclude that Berkson and Rind knew of and participated in the fraudulent use of customers' securities.

Both Berkson and Rind argue that the evidence against them was insufficient. Both contentions are without merit.

A. Berkson

Berkson argues that even if Gallertine's grand jury testimony concerning his knowledge of the criminal activity were properly admitted, there is, nevertheless, insufficient evidence of his participation. This claim is preposterous. Berkson was an officer, a director, and a principal stockholder of Packer, Wilbur (GX 29). He had a direct voice in governing the affairs of the firm and directly profited from the benefits to the firm of the illegal activity. His was simply not the case of an innocent bystander who merely knew that a crime was being committed. Because of his position, he had an obligation to the customers of the firm whose stock was being misappropriated and to the other brokers to whom that stock was being sold to put a stop to the illegal activity or, at least, to alert them to it. By his silent acquiescence, even if that were all he did, he participated in the scheme and sought to make it succeed. *United States* v. *Wolfson*, 437 F.2d 862, 878 (2d Cir. 1970); see also *United States* v. *Natelli*, 527 F.2d 311, 318-19 (2d Cir. 1975), *cert. denied*, 96 Sup. Ct. 1665 (1976).

Moreover, Berkson did not participate by silence alone, although this Court has held that, in the proper context,

silence alone may suffice to demonstrate participation in a conspiracy. *United States* v. *Eucker*, 532 F.2d 249, 254 (2d Cir. 1976). The jury could reasonably conclude from the evidence that, on at least three occasions, Berkson was an active participant.* The August 20, 1970, sale of 10,000 shares of Ephraim Bloch's Robotguard stock to R.G. Berkson & Co. took place on the same day that Bloch's stock was delivered to the firm. From the evidence of his conversation with Bloch's lawyer, it is clear that Berkson knew the circumstances under which Bloch's stock was in the firm's possession and that the firm did not have the right to use the stock for itself. That Berkson was aware of the proposed sale of 10,000 shares of Robotguard is clear from his request to his father for money to pay for it. Berkson's position as the signatory for the R.G. Berkson & Co. account to which the stock was delivered was further evidence of his knowledge of the details of the transaction. His second conversation with his father, in which he told his father that his $40,000 would not be needed, sustains the conclusion that he did not want his father to be involved in an illegal transaction. The contrary interpretation of the evidence relating to Berkson's father, that it demonstrated Berkson's lack of knowledge, was argued to the jury, which quite properly rejected it.

Berkson's conversation with Mrs. Melling in which he advised her not to sell her Leasepac stock is also evidence of his active participation. Although there was no direct evidence that Berkson knew her stock had already been used illegally by Packer, Wilbur, the fact that he advised her against selling during the same period in which he sold Leasepac stock for the discretionary account of Sam

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* The evidence must, of course, be viewed in the light most favorable to the Government. *United States* v. *Castellana*, 349 F.2d 264, 267 (2d Cir. 1965); *cert. denied*, 383 U.S. 928 (1966).

Caplan warranted the conclusion that his purpose was to deceive Mrs. Melling. The contrary interpretation, that different advice to different investors is normal and proper, was argued to and rejected by the jury.

Finally, Berkson's failure to advise Sam Caplan that Caplan's stock had been sold and was no longer available on March 4, 1971, when Caplan requested it, supports the conclusion that Berkson was actively concealing this fact from Caplan in order to prevent the fraudulent scheme from being discovered. The cumulative probative value of these events was clearly for the jury to weigh. The fact that Berkson offers—and vainly offered at trial—alternative explanations for each of these acts is irrelevant, since "[t]he prosecution . . . is under no duty to negate all possible innocent inferences from a set of circumstantial facts. . . ." *United States* v. *Singleton*, 532 F.2d 199, 203 (2d Cir. 1976).

All of the above evidence more than sufficiently supports the jury's conclusion that Berkson knew of and participated in the fraud. *United States* v. *Scandifia*, 390 F.2d 244, 248-50 (2d Cir. 1968); *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). See also *United States* v. *Blitz*, 533 F.2d 1329 (2d Cir. 1976). Berkson's claims to the contrary merely constitute a request to this Court to disobey its own recent admonition that "we may not substitute our own view of the evidence for that of the jury." *United States* v. *Sears*, Dkt. No. 76-1154, slip op. 257, 259 (2d Cir. Oct. 26, 1976).

B. Rind

Rind's argument that there was insufficient evidence of his knowledge and participation is founded on a complete misstatement and distortion of the evidence. Gallentine testified, over and over again, that, in the course

of the various transactions, it was Rind who told Gallentine to use customers' stock to cover the transactions, (Tr. 41, 55, 65), that Gallentine told Rind it was necessary to forge the customers' signatures. (Tr. 58), and that Rind told him to do whatever had to be done to obtain the stock necessary to complete the transactions. (Tr. 83). A clearer case of Rind's knowledge and participation could only be made if Rind, himself, admitted his guilt. Furthermore, it is established law in this circuit that a conviction may be based upon the uncorroborated testimony of an accomplice. *United States* v. *Bernstein*, 553 F.2d 775, 790-91 (2d Cir. 1976); *United States* v. *Messina*, 481 F.2d 878, 881 (2d Cir. 1973), *cert. denied*, 414 U.S. 974 (1974).

Rind also argues that there was no single conspiracy proved as alleged in the indictment. He does not argue that there were multiple conspiracies but that there was no evidence that Rind was involved in the conspiracy charged and proved. This is actually a restatement of his argument that the evidence was insufficient. That argument, as we have pointed out above, is totally without merit. The sole decisions upon which he relies, *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975), and *Kotteakos* v. *United States*, 328 U.S. 750 (1946), are wholly inapposite. Each of those cases involved discrete, unconnected acts without a common unifying agreement. Here, by contrast, the illicit agreement in which Rind joined was to commit a related series of acts during a closely circumscribed period of time. Cf. *United States* v. *Bernstein*, *supra*, at 791; *United States* v. *Steinberg*, 525 F.2d 1126, 1133 (2d Cir. 1975).

POINT III

The court's instruction to the jury on the subject of conscious avoidance of the facts was not error.

The defendant Berkson argues that the court's instruction to the jury that:

> "In determining whether a defendant acted knowingly you may consider whether the defendant deliberately closed his eyes in order to deliberately avoid knowing what otherwise would have been obvious to him" (Tr. 574-75).

was reversible error.

Berkson does not claim that such a charge is generally erroneous, but argues that, in the context of this case, the charge was improper. The argument appears to be that, because the Government's proof and argument of the case to the jury relied on Berkson's specific knowledge of the unauthorized use of customers' securities, as related to him by Gallentine, it was inappropriate to give a conscious avoidance charge.

As was the case with Berkson's arguments concerning the admissibility of Gallentine's grand jury testimony, he has isolated one sentence from a lengthy charge, taken it out of context, and argued that it was improper.

The "closed his eyes" instruction was immediately followed by an instruction that:

> "All these crimes charged in this indictment requires specific intent. Specific intent, as the term implies, means more than a general intent to commit an act. To establish specific intent the Government must prove that the defendant knowingly did an act which the law forbids, and he purposely intended to violate the law" (Tr. 575).

Subsequently, in describing the conspiracy count, the court instructed the jury:

> "To determine whether a defendant was a member of the conspiracy you ask yourself whether a particular defendant acted wilfully and with knowledge that his acts were an integral part of the alleged unlawful enterprise . . ." (Tr. 578).

Finally, in describing the interstate transportation counts, the court instructed the jury:

> "The Government does have to prove beyond a reasonable doubt that the defendant knew that the stock transfer power was forged, and that he acted with an unlawful or fraudulent intent; that is to say, with a bad motive" (Tr. 589).

Clearly, the charge when viewed in its entirety—as it must be, see *United States* v. *Magnano*, Dkt. No. 76-1402, slip op. 5679 (2d Cir. Sept. 7, 1976); *United States* v. *Santiago*, 528 F.2d 1130 (2d Cir. 1976)—properly instructed the jury that the defendants could only be convicted if the jury found beyond a reasonable doubt that they had the requisite knowledge and intent. Contrary to Berkson's allegation, the jury was not invited to "speculate."

In addition, the "closed his eyes" charge—which Berkson does not claim was improper in context—was proper in light of the evidence in the case that the defendants, particularly Berkson, were not always told all of the details of the illegal activity. For example, Gallentine told Berkson that they were using customers' securities without authority but did not tell him specifically that they were forging the customers' signatures on the stock transfer powers. (Tr. 104-05). Similarly, Gallentine's testimony established that he told Rind that they were

using customers' securities to make delivery for the various sales Rind had made, (Tr. 41, 65), but did not, in every instance, tell Rind of the forgery of customers' signatures, (Tr. 42), and that Rind told Gallentine to do whatever had to be done. (Tr. 83). Under these circumstances, the "closed his eyes" charge properly informed the jury that, despite the lack of direct evidence of knowledge of each defendant of forgery in each of the transactions, the jury could find such knowledge if they found a particular defendant had deliberately ignored the obvious fact that, in order for the customers' securities to be negotiable, their signatures had to be forged on stock transfer powers. (Tr. 41-43). *United States* v. *Gentile*, 530 F.2d 461 (2d Cir. 1976).

POINT IV

The sentence imposed on the defendant Rind was within statutory limits and is thus not subject to review.

Rind argues that his case should be remanded for resentencing because of the disparity between his sentence, 18 months' imprisonment and fines of $10,000, and the co-defendant Berkson's sentence, suspended sentence and fines of $25,000.

The sentence imposed on the defendant Rind was well within the statutory limits and is thus not subject to review. *United States* v. *Tucker*, 404 U.S. 443 (1972); *United States* v. *Brown*, 479 F.2d 1170 (2d Cir. 1973). The court expressed its opinion, based on the evidence in the case, that Rind was the more culpable of the two defendants and thus deserving of a more severe sentence. The court's view of the evidence was not unreasonable The court did not rely on "constitutionally impermissible

factors or upon material inaccuracies," and this Court is thus "bound by the basic principle against appellate review of sentences . . ." *United States* v. *Brown*, *supra*, at 1172. *United States* v. *Robin*, Dkt. No. 76-1033, slip op. 809 (2d Cir. Oct. 15, 1976) and *United States* v. *Stein*, Dkt. No. 76-1299, slip op. 211 (2d Cir. Oct. 22, 1976), upon which Rind relies, involved defects in the procedures by which the defendants were sentenced and thus are totally inapplicable to this case.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

JOHN A. LOWE, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 7th day of December, 1976 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

Edward Brodsky, Esq.
Spengler, Carlson, Gubar,
Churchill & Brodsky
280 Park Avenue
New York, NY 10022

and

Irving Anolik, Esq.
225 Broadway
New York, NY 10007

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing within the United States Courthouse Annex, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

John A. Lowe

JOHN A. LOWE
Assistant United States Attorney

Sworn to before me this

7th day of December, 1976

Maria A. Israelian

NOTARY PUBLIC

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4516651
Qualified in New York County
Term Expires March 30, 1978